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09/822,606	04/02/2001	Paul Gaschke		8217

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EXAMINER
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WEISS JR, JOSEPH FRANCIS

ART UNIT	PAPER NUMBER
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3761

DATE MAILED: 07/01/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.  
09/822,606

Applicant(s)  
Gaschke

Examiner  
Joseph Weiss

Art Unit  
3761



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on Apr 2, 2001
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-17 is/are pending in the application.
- 4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-17 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some\* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s). 4 6) ☐ Other:

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## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Claim 1 recites the limitation "the mouth" in line 2. There is insufficient antecedent basis for this limitation in the claim.

4. Claim 1 recites the limitation "the vicinity" in lines 6-7. There is insufficient antecedent basis for this limitation in the claim.

5. Claim 4 recites the limitation "the wearer's" in line 2. There is insufficient antecedent basis for this limitation in the claim.

6. Claim 4 recites the limitation "said third and optional additional holes" in lines 1-2. There is insufficient antecedent basis for this limitation in the claim.

7. Claim 5 recites the limitation "said third and optional additional holes" in lines 1-2. There is insufficient antecedent basis for this limitation in the claim.

In regards to claim 5, line 2 applicant sets forth the relative orientational term "downward" however no orientation as first been set forth to determine what "downward" would be relative to the device.

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8. Claim 6 recites the limitation "said head garment's second hole" in line 3. There is insufficient antecedent basis for this limitation in the claim.

In regards to claim 9, line 2, what is "its"?

9. Claim 11 recites the limitation "said mouth disc forming and nose channel forming members" in lines 1-2. There is insufficient antecedent basis for this limitation in the claim.

10. Claim 12 recites the limitation "the flow" in line 2. There is insufficient antecedent basis for this limitation in the claim.

In regards to claim 12, line 2 applicant sets forth the relative orientational term "external" however no orientation as first been set forth to determine what "external" would be relative to the device.

Furthermore, the scope of claim 12 cannot be determined due to the use of the term "and/or" creating confusion as to whether or not the subsequent limitations are conjunctively or disjunctively inclusive.

11. Claim 13 recites the limitation "the wearers nose" in lines 2-3. There is insufficient antecedent basis for this limitation in the claim. (Note also the improper punctuation on the possessive form of wearer used)

In regards to claim 13, line 2 applicant sets forth the relative orientational term "upper" and "lower" however no orientation as first been set forth to determine what "upper" and "lower" would be relative to the device.

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12. Claim 14 recites the limitation "the front side" in line 2. There is insufficient antecedent basis for this limitation in the claim.

In regards to claim 14, line 2 applicant sets forth the relative orientational term "front" however no orientation as first been set forth to determine what "front" would be relative to the device.

13. Claim 15 recites the limitation "the head" in line 2. There is insufficient antecedent basis for this limitation in the claim.

14. Claim 15 recites the limitation "the mouth" in line 3. There is insufficient antecedent basis for this limitation in the claim.

15. Claim 15 recites the limitation "the nostrils" in line 4. There is insufficient antecedent basis for this limitation in the claim.

In regards to claim 15, line 10 applicant sets forth the relative orientational term "generally downward" however no orientation as first been set forth to determine what "generally downward" would be relative to the device.

In regards to claim 15, line 11, what is "its"?

16. Claim 15 recites the limitation "the external" in line 20. There is insufficient antecedent basis for this limitation in the claim.

***Claim Rejections - 35 USC § 102***

17. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

18. Claims 1-2, 6, 12-13 are rejected under 35 U.S.C. 102(b) as being anticipated by Conkle (US 1139850).

In regards to claim 1, Conkle discloses a head garment (Fig 1) adapted to fit over a user's mouth & nose; with a means mounted on the head garment (15) forming a first channel (5) for breath inhaled/exhaled from a user's mouth and forming a second channel (4) for breath inhaled/exhaled from a user's nose; the channels being separated from each other at least in at a user's oro-nasal region whereby user breath from the first and second channels is directed away from the user's nose & mouth. Having all the structure as set forth by applicant. The device of Conkle would be fully capable of and inherently serving as a "cold weather breathing apparatus".

In regards to claim 2, Conkle discloses the head garment as having a first hole aligned with the user's mouth (orifice from pipe 9 opening into the oral cavity of the garment) and a second hole aligned with the user's nose (orifice from pipe 8 opening into the nasal cavity of the garment) said first channel (5) formed by a mouth channel forming member (that portion of mask 2 that forms the oral cavity/channel of the mask) and has a hole aligned with the head garment's first hole (the opening in mask 2 that corresponds to the terminal orifice of 9 at the mask/pipe 9 interface) and a second hole aligned with the head garment's second hole. (The opening on mask 2 that is aligned with the orifice of pipe 8.

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In regards to claim 6, Conkle discloses a second channel formed by a nose channel formed by a nose channel forming member (portion of mask 2 that forms the nasal cavity of the mask) having a first hole (hole formed in the body of the mask that is aligned with the terminal orifice of pipe 8) aligned with a hole from of the head garment.

In regards to claim 12, Conkle discloses the use of air diverting features (the peripheral seal around the mask noted by the dashed line in fig 1) which are formed to reduce or eliminate ambient air flow into the nose or mouth channel.

In regards to claim 13, Conkle discloses the use of two panels that may be characterized as “upper” and “lower” when the mask is in use and upper is viewed as that portion of the device adjacent to the user’s nasal bridge and lower being any portion of the device oriented 180 degree’s opposite of that position of the device.

***Claim Rejections - 35 USC § 103***

19. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

20. Claims 3-5 & 7-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Conkle as applied to claims 2 & 6 above, and further in view of Stroup (US 4610247).

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In regards to claim 3, Conkle substantially discloses the instant application's claimed invention, but does not explicitly disclose the use of a lateral hole for directing exhalation away from a user's oro-nasal region. However, Stroup disclose such (see figs 2 & 4, orifice 24 & see fig. 3 air flow vic 17/18). The references are analogous since they are from the same field of endeavor, the respiratory arts. At the time the instant application's invention was made, it would have been obvious to one of ordinary skill in the art to have taken the features of Stroup and used them with the device of Conkle. The suggestion/motivation for doing so would have been to optimize the warm air affect of the device (col. 2 lines 50-60) and minimize rebreathing. Therefore it would have been obvious to combine the references to obtain the instant application's claimed invention.

Furthermore, such a feature is old and well known in the art, and one of skill in the art would consider such to amount to a matter of mere obvious and routine choice of design, rather than constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

In regards to claim 4, suggested device discloses use of a plurality of the "third orifice" (note that 2 hole 24's are used by Stroup) and which are oriented towards a user's face.

In regards to claim 5, the suggested device substantially discloses the claimed invention except to include the diversion of gas away from the user, but does not characterize this diversion as "downward."



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It is noted that applicant's specification does not set forth a downward diversion, as unexpectedly providing any new result or unexpectedly solving any new problem in the art over the prior art.

Accordingly, the examiner considers the selection of a downward diversion to be a mere obvious matter of design choice and as such does not patently distinguish the claims over the prior art, barring a convincing showing of evidence to the contrary.

Furthermore, such a feature is old and well known in the art, and one of skill in the art would consider such to amount to a matter of mere obvious and routine choice of design, rather than constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

In regards to claim 7, Conkle substantially discloses the instant application's claimed invention, but does not explicitly disclose the nose channel forming member as having at least a second hole spaced laterally from the first hole for directing exhaled breath away from a user's oro-nasal region. However, Stroup disclose such (see figs 2 & 4, orifice 24 & see fig. 3 air flow vic 17/18). The references are analogous since they are from the same field of endeavor, the respiratory arts. At the time the instant application's invention was made, it would have been obvious to one of ordinary skill in the art to have taken the features of Stroup and used them with the device of Conkle. The suggestion/motivation for doing so would have been to optimize the warm air affect of the device (col. 2 lines 50-60) and minimize rebreathing. Therefore it would have been obvious to combine the references to obtain the instant application's claimed invention.

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Furthermore, such a feature is old and well known in the art, and one of skill in the art would consider such to amount to a matter of mere obvious and routine choice of design, rather than constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

In regards to claim 8, the references noted above substantially disclose the claimed invention except for the nose channel forming member being removably inset within the mouth channel forming member.

It is noted that applicant's specification does not set forth such, as unexpectedly providing any new result or unexpectedly solving any new problem in the art over the prior art.

Accordingly, the examiner considers the selection of such to be a mere obvious matter of design choice and as such does not patently distinguish the claims over the prior art, barring a convincing showing of evidence to the contrary.

Furthermore, such a feature is old and well known in the art, and one of skill in the art would consider such to amount to a matter of mere obvious and routine choice of design, rather than constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

21. Claims 9-11 & 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Conkle as applied to claims 1-2 above, and further in view of Daneshvar (US 5839432).

In regards to claim 9, Conkle substantially discloses the instant application's claimed invention, but does not explicitly disclose a mouth disc with a hole passed through the disc's

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center for fastening around the first hole of the head garment. However, Daneshaver disclose such (See fig 4, disk 34, holes 35 or 36). The references are analogous since they are from the same field of endeavor, the respiratory arts. At the time the instant application's invention was made, it would have been obvious to one of ordinary skill in the art to have taken the features of Daneshvar and used them with the device of Conkle. The suggestion/motivation for doing so would have been to better regulate the flow of air through the hole. Therefore it would have been obvious to combine the references to obtain the instant application's claimed invention.

Furthermore, such a feature is old and well known in the art, and one of skill in the art would consider such to amount to a matter of mere obvious and routine choice of design, rather than constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

In regards to claim 10, the disc of the suggested device is removable.

In regards to claim 11, the suggested device discloses the disc & nose forming channels as attached to the head garment and the mouth forming channel being mounted to both the nose forming channel & the disc.

In regards to claim 14, Conkle substantially discloses the instant application's claimed invention, but does not explicitly disclose the oro-nasal portion of the device as being movable to expose the region to ambient. However, Daneshaver disclose such (See figs 1-2, not the covering & uncovering of the oro-nasal region). The references are analogous since they are from the same field of endeavor, the respiratory arts. At the time the instant application's invention

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was made, it would have been obvious to one of ordinary skill in the art to have taken the features of Daneshvar and used them with the device of Conkle. The suggestion/motivation for doing so would have been to permit the user to remove this substructure of the device to permit unrestricted breathing when the environment is not as cold, but retain the remainder of the device for user warmth. Therefore it would have been obvious to combine the references to obtain the instant application's claimed invention.

Furthermore, such a feature is old and well known in the art, and one of skill in the art would consider such to amount to a matter of mere obvious and routine choice of design, rather than constitute a patently distinct inventive step, barring a convincing showing of evidence to the contrary.

22. Claims 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Conkle, Stroup & Daneshvar.

In regards to claims 15-17, they are rejected by the combination of Conkle, Stroup & Daneshvar as noted in the above rejection to claims 1-14, which is herein incorporated by reference in regards to the limitations of the claims as set forth by applicant.

### *Conclusion*

23. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. US 5704068, 5511541, 5431158, 5265595, 5243972, 4971051, 4895143, 4768235, 4473071, 4412537, 4269183, 4150671, 2348074, 2260701, 1050621

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Any inquiry concerning this communication or earlier communications from the Examiner should be directed to Joseph F. Weiss, Jr., whose telephone number is (703) 305-0323. The Examiner can normally be reached from Monday-Friday from 8:30 AM to 4:30 PM.

If attempts to reach the Examiner by telephone are unsuccessful, the Examiner's supervisor, Aaron Lewis, can be reached at telephone number (703) 308-0716. The official fax number for this group is (703) 305-3590 or x3591.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0858.



Jfweiss

June 20, 2002



DENNIS RUHL  
PRIMARY EXAMINER